Hainie bin Hamid v Pendakwa Raya

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO Q–05–8 OF 1999
DENIS ONG, MOHD SAARI AND MOHD NOOR AHMAD JJCA
7 MARCH 2003

Criminal Law — *Penal Code — s 300 Exceptions — Exception 4 — Appellant convicted of murder and sentenced to death — Non-direction — Whether the accused's case fell under exception 4 to s 300*

The appellant, PW3, PW4 and PW5 were involved in a fight with the deceased and another Chinese man. The deceased was stabbed with a knife by the appellant and died. The cause of the death was due to severe chest injuries with massive internal bleeding. The penetrating wound at the back of the chest caused the death. The appellant in his defence admitted his involvement in the fight but denied stabbing the deceased with the knife. The learned judge held that there was neither evidence of grave and sudden provocation nor the right of private defence and that the defence of denial was an afterthought. The appellant was convicted on the uncorroborated evidence of accomplices (PW3 and PW4) after the learned judge had warned himself of the danger of acting on such evidence. The appellant was sentenced to death for the murder. This was the appellant's appeal against the conviction and sentence.

Held, allowing the appeal and substituting the sentence to 18 years' imprisonment with effect from the date of arrest:

(1) The court was compelled to disturb the learned judge finding as to the guilt of the appellant by reason of his complete failure to address his mind on exception 4 to s 300 of the Penal Code, that is to say, death caused without pre-meditation in a sudden fight. On the evidence, it was manifestly clear that there was a sudden fight or the fight was unpremeditated. Hence, the learned judge should have considered the defence available to the appellant under the exception. As there was a non-direction by the learned judge on this issue there was misdirection (see p 406F–G).

(2) To invoke the exception, four requisites must be satisfied, that is to say: (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was committed in the heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. With regard to conditions (i) and (ii) the facts spoke by themselves. On conditions (iii) and (iv), the evidence revealed that the acts of the appellant in the course of the melee leading to the stabbing of the deceased were done within very short intervals apparently with no opportunity for cooling off. When an accused person endeavors to bring himself within one of the exceptions, it is sufficient for his purpose if a reasonable doubt is raised in the

mind of the trial judge as to whether or not the necessary factors exist. If as a result of the evidence of the whole case, taken and considered together the learned judge finds himself in genuine doubt as to whether or not the case falls within one of the exceptions, then his verdict on the point must be in favor of the accused (see pp 406G–407B); *Soh Cheow Hor v Regina* [1960] MLJ 254 followed.

[Bahasa Malaysia summary

Perayu, PW3, PW4 dan PW5 telah terlibat di dalam suatu pergaduhan dengan si mati dan seorang lagi lelaki Cina. Si mati telah ditikam dengan pisau oleh perayu dan meninggal dunia. Sebab kematian adalah kerana kecederaan teruk di bahagian dada dan pendarahan dalaman yang banyak. Luka yang menembusi bahagian belakang dada telah menyebabkan kematian. Perayu dalam pembelaan beliau telah mengaku tentang penglibatan beliau dalam pergaduhan tersebut tetapi menafikan telah menikam si mati dengan pisau. Hakim yang bijaksana telah memutuskan bahawa tiada apa-apa keterangan yang serius dan bangkitan marah yang tiba-tiba maupun hak pembelaan persendirian dan bahawa pembelaan penafian hanya difikirkan kemudian. Perayu telah disabitkan berdasarkan keterangan yang tidak disokong rakan-rakan sejenayah (PW3 dan PW4) setelah hakim yang bijaksana mengingatkan dirinya tentang bahaya untuk bertindak atas keterangan tersebut. Perayu telah dijatuhkan hukuman mati kerana membunuh. Ini adalah rayuan beliau terhadap sabitan dan hukuman.

Diputuskan, membenarkan rayuan tersebut dan menggantikan hukuman kepada 18 tahun penjara mula berkuatkuasa dari tarikh tangkapan:

(1) Mahkamah terpaksa mengganggu penemuan hakim yang bijaksana berhubung penemuan kebersalahan perayu oleh sebab kegagalan hakim yang bijaksana untuk menumpukan minda beliau kepada pengecualian 4 kepada s 300 Kanun Keseksaan, untuk mengatakan bahawa, kematian yang berlaku adalah tanpa dirancang di dalam satu pergaduhan tiba-tiba. Berdasarkan keterangan, ia adalah amat jelas bahawa telah berlaku satu pergaduhan secara tiba-tiba atau pergaduhan yang tidak dirancang telah berlaku. Justeru itu, hakim yang bijaksana patut mempertimbangkan pembelaan yang ada untuk perayu di bawah pengecualian tersebut. Memandangkan tidak terdapat arahan oleh hakim yang bijaksana tentang persoalan ini maka terdapat suatu salah arah (lihat ms 406F–G).

(2) Untuk menggunakan pengecualian tersebut, empat keperluan perlu dipenuhi, iaitu: (i) ia adalah satu pergaduhan secara tiba-tiba; (ii) ia tidak dirancang terlebih dahulu; (iii) tindakan tersebut

telah dilakukan apabila seseorang itu naik berang; dan (iv) penyerang tidak mengambil apa-apa kesempatan yang tidak wajar atau bertindak kejam. Berhubung syarat-syarat (i) dan (ii) fakta-fakta kes telah dengan sendirinya menjurus ke arahnya. Berdasarkan syarat-syarat (iii) dan (iv), keterangan menunjukkan bahawa tindakan perayu dalam keadaan kelam-kabut yang menyebabkan si mati ditikam telah berlaku dalam jarak waktu yang singkat yang nyata tiada peluang untuk keadaan menjadi tenang. Apabila seorang tertuduh berusaha untuk menjadikan dirinya terangkum di bawah salah satu daripada pengecualian tersebut, ia adalah mencukupi bagi tujuan beliau jika satu keraguan munasabah telah timbul dalam minda hakim perbicaraan berhubung sama ada atau tidak faktor-faktor yang perlu tersebut wujud. Jika akibat daripada keterangan keseluruhan kes, setelah diambilkira dan dipertimbangkan bersama, hakim yang bijaksana mendapati dirinya dalam keraguan tentang sama ada atau tidak kes tersebut terangkum di bawah salah satu daripada pengecualian tersebut, maka keputusan beliau tentang perkara tersebut perlu menyebelahi tertuduh (lihat ms 406G–407B); *Soh Cheow Hor v Regina* [1960] MLJ 254 diikut.]

Notes

For cases on Penal Code s 300 exceptions, see 4 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1175–1176.

Cases referred to

Soh Cheow Hor v Regina [1960] MLJ 254 (folld)

Legislation referred to

Penal Code ss 300 exception 4, 304(a)

Robin Hii (*Robin Hii & Co*) for the appellant.
Mahmud bin Haji Abdullah (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Mohd Noor Ahmad JCA (delivering judgment of the court): The appellant was convicted and sentenced to death for the murder of one Ting Kung Kui committed on 28 December 1997 between 12am and 12.30am at the five-foot way of shop No 24 Bank Road, Sarikei, Sarawak. On appeal, we allowed the appeal, quashed the conviction and set aside the sentence but substituted with a conviction under s 304(a) of the Penal Code and sentenced him to 18 years' imprisonment with effect from the date of arrest.

The conviction of the appellant is mainly based on the ocular evidence of PW4 and PW5. The facts emerging from the evidence of these two main

witnesses coupled with the evidence of the other prosecution witnesses may be summarized as follows. A

On the night of 27 December 1997 around midnight, after an earlier altercation with PW3, the deceased and another Chinese man returned to PW3's burger stall in a motor van, each armed with a *nibong* baton. The deceased approached PW3 while the other Chinese man waited beside the motor van. The deceased then hit at the left side of PW3's body with the baton. PW3 managed to embrace the deceased. While PW3 was embracing the deceased, PW4, PW5 and the appellant went to help PW3. PW4 used a chair to hit the deceased while PW5 and the appellant used an iron rod each to hit the deceased. After the hit, the deceased fell down pinning PW3 underneath him. Then the appellant approached the other Chinese man and hit him with an iron rod. The other Chinese man fainted. B C

Thereafter, the appellant went to the burger stall and returned with a knife to the place where PW3 and the deceased were struggling and stabbed the deceased. The post-mortem reveals that the deceased suffered a penetrating wound on the right chest which injured the liver and another penetrating wound at the back of the chest which injured the right lung and some 21 superficial cut wounds. The cause of the death was due to severe chest injuries with massive internal bleeding. The penetrating wound at the back of the chest caused the death. D

The appellant in his defence admitted his involvement in the fight with the other Chinese man but denied stabbing the deceased with the knife. The learned judge held that there was neither evidence of grave and sudden provocation nor the right of private defence and that the defence of denial was an afterthought. And the appellant was convicted on the uncorroborated evidence of accomplices (PW3 and PW4) after the learned judge had warned himself of the danger of acting on such evidence. E F

We decline to interfere with the findings of fact by the learned judge. However, we are compelled to disturb his finding as to the guilt of the appellant by reason of his complete failure to address his mind on exception 4 to s 300 of the Penal Code, that is to say, death caused without pre-meditation in a sudden fight. On the evidence, it is manifestly clear that there was a sudden fight or the fight was unpremeditated. Hence, the learned judge should have considered the defence available to the appellant under the exception. As there was a non-direction by the learned judge on this issue there was a misdirection. Therefore, we now take upon ourselves the task of analyzing the evidence towards this end. It is trite law that to invoke the exception, four requisites must be satisfied, that is to say: (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was committed in the heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. G H

With regard to conditions (i) and (ii) the facts speak by themselves. On conditions (iii) and (iv), the evidence reveals that the acts of the appellant in the course of the melee leading to the stabbing of the deceased were done within very short intervals apparently with no opportunity for cooling off. As usual in the fight, the blood already heated up was warmed at every I

A subsequent stroke and the voice of reasons was not heard on either side in the heat of passion. Under such circumstances, there cannot be much room for discriminating between the respective degree of blame with reference to the state of things either at the commencement of or in the course of the fray. It is settled law that when an accused person endeavors to bring himself within one of the exceptions, it is sufficient for his purpose if a B reasonable doubt is raised in the mind of the trial judge as to whether or not the necessary factors exist. If as a result of the evidence of the whole case, taken and considered together the learned judge finds himself in genuine doubt as to whether or not the case falls within one of the exceptions, then his verdict on the point must be in favor of the accused (see *Soh Cheow Hor v Regina* [1960] MLJ 254). In the light of the factors we have already said, C it is impossible for us to say that the learned judge, if he had fully directed his mind to the exception, would necessarily still have found the appellant guilty of murder.

Therefore, in view of the borderline nature of the evidence relating to the exception and having regard to the fact that the conviction for murder D was based on the uncorroborated evidence of the accomplices, to our mind it would not be safe to allow the murder conviction to stand.

In our opinion, the sentence imposed is sufficient to meet the need of public interest.

As regards the exhibits, we confirm the order of the learned judge made E on 2 February 1999 (per record of appeal at p 211).

Appeal allowed and sentence substituted to 18 years' imprisonment with effect from the date of arrest.

Reported by Peter Ling

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